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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Albert Victory seeks a writ of certiorari to the New York Court of Appeals to review a judgment of that court entered October 23, 1971, which unanimously affirmed a judgment of the Appellate Division, First Department, recorded December 7, 1971, which unanimously affirmed, without opinion, a judgment of the Supreme Court, New York County, rendered May 26, 1970, convicting him after a jury trial of one count of the crime of felony murder [N.Y. Penal Law §125.25(3)] and sentencing him to a term of imprisonment of from 25 years to life.

Statement of the Case

John Varecha, a 25-year-old uniformed patrolman, was stationed at his post on a rainy Sunday night in Manhattan, five and one-half years ago, when he saw a car speeding through a red traffic light. Hailing a taxicab, he gave chase, unaware that his split-second decision to enforce the traffic law would cost him his life.

Pulling up behind the offending vehicle after it had stopped in front of a discotheque, the officer quickly approached the two occupants, the petitioner, Albert Victory, the operator, and Robert Bornholdt, as they were about to enter the nightclub, and tried to question them. Victory, "smirking" (LaGuardia, 897),* and dangling the car keys in his hand, denied driving the car, asserting that he and his companion had arrived by truck (F. Garcia, 1032, 1035; D. Garcia, 1331; LaGuardia, 842-3; Gentry, 1464-5).

Spurning further questioning, Victory and Bornholdt started to enter the nightclub. When the officer tried to bar their way, demanding satisfactory answers, Victory, enraged, grabbed the officer's raincoat, lifted him up by the lapels and threatened, "Don't you ever do that again" (F. Garcia, 1039, 1107; D. Garcia, 1334; LaGuardia, 843, 929-30; Gentry, 1468, 1470-1). They struggled, and as they moved down the block, witnesses who had just come out of the discotheque saw Victory kick the officer in the groin "very hard," as Bornholdt pounced on the patrolman's back (F. Garcia, 1042-6, 1122; D. Garcia, 1338-9, 1341, 1369-70, 1402; Gentry, 1472-3).

* Unless otherwise noted, numbers in parentheses refer to pages of the nine-volume printed record on appeal filed in the state courts. Numbers followed by the letter "A" are to the preliminary papers contained in the first volume of the record.

Defending himself with his nightstick, the injured policeman simultaneously drew his gun and, bent over in pain, told his assailants that they were under arrest (F. Garcia, 1049-50). Instead, Victory moved backwards toward an alley, repeating, "Come on. Give me a break," while Bornholdt kept angling behind the officer, preventing him from focusing his attention on both men at the same time (F. Garcia, 1050-1, 1134; D. Garcia, 1343; LaGuardia, 850-3, 855-6, 859, 969, 976). At some point, Victory raised his arms and edged over to a wall briefly, only to withdraw immediately from it and to continue to move into the alley (F. Garcia, 1052, 1241, 1248, 1315; D. Garcia, 1344, 1435; LaGuardia, 869-70).

Francisco Garcia, who had entered the alley to assist the officer, saw Victory and Bornholdt continuously edging around the injured officer (1243, 1246-8, 1315), and heard Victory say, "Get the cop" (1053, 1189-90, 1194-5), or "Get a cop. This guy is crazy" (1242, 1280-1). Garcia heard Victory order him to "Get the fuck out of here. Mind your own business" (1058, 1312); just then Garcia saw Bornholdt grab for something in his pocket (1058, 1249). As Garcia retreated, looking away from the officer and his prisoners, he heard two shots, and, turning, saw Victory and Bornholdt grappling with the officer (1059, 1164-5) as Bornholdt emptied his gun into the officer's body, mortally wounding him.

Bornholdt left the alley and ran, followed seconds later by Victory, who ignored police warnings to halt, ducked police bullets and kept running, only to be subdued by the police after a fierce struggle.

Section 125.25 of the current New York Penal Law, while limiting the number of crimes which may form the

predicate for felony murder, codified the prior doctrine of felony murder. Under this doctrine, a person is guilty of murder when:

> "3. Acting either alone or with one or more other persons, he commits or attempts to commit * * * escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants * * *."

Section 205.10 of the New York Penal Law provides that a person is guilty of the felony of escape in the second degree when, "Having been arrested for * * * a felony, he escapes from custody"; custody is defined as "restraint by a public servant pursuant to an authorized arrest * * *." N.Y. Penal Law §205.00(2). Assault in the second degree, a felony, is committed when: "With intent to prevent a peace officer from performing a lawful duty, * * * [a person] causes physical injury to such peace officer." N.Y. Penal Law §120.05(3). Physical injury "means impairment of physical condition or substantial pain." N.Y. Penal Law §10.00(9).

At the trial, the People's theory that Victory and Bornholdt had been arrested for assaulting Patrolman Varecha and had killed the police officer "in the course and in the furtherance of" the felony of escape in the second degree was established by the four eyewitnesses to the altercation, the testimony of the officer who arrested the fleeing duo, and the medical and ballistics evidence showing that Varecha was killed by bullets fired from Bornholdt's gun. Victory argued that he had not participated in the killing and had not escaped, while Bornholdt, admitting the killing

(see 2682-3), introduced psychiatric testimony which the People rebutted.

On April 17, 1970, the defendants were found guilty: Victory of felony murder and Bornholdt, the shooter, of felony murder and intentional murder. After a hearing to determine sentence [N.Y. Penal Law §125.30] the jury recommended life imprisonment.

On May 26, 1970, each defendant was sentenced to a term of imprisonment of from twenty-five years to life (3517, 3519-20).

On appeal to the Appellate Division, Victory argued that he was not proven guilty beyond a reasonable doubt, that the affirmative defense in New York Penal Law §125.25 is unconstitutional, that there were errors in the court's charge, and that the court demeaned defense counsel, improperly limited cross-examination, excluded relevant proof, and denied his right to counsel; he also argued that he was entitled to a severance and that there was an improperly "death qualified" jury.

On December 7, 1971, the Appellate Division, First Department, unanimously affirmed, without opinion, Albert Victory's conviction. *People* v. *Victory*, 38 A.D.2d 689 (1971) (S.R.5).*

In the New York Court of Appeals Victory repeated each of his earlier claims. On October 23, 1973 the Court of Appeals unanimously affirmed the convictions of both Victory and Bornholdt. The opinion by Judge JASEN, for the unanimous court, rejected Victory's claims. The opinion is reported as *People* v. *Bornholdt*, 33 N.Y.2d 75, 305 N.E.2d 461 (1973).

* References preceded by "S.R." are to the pages of the printed Supplemental Record on Appeal filed in the New York Court of Appeals.

Albert Victory invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1257. The time for doing so having expired, Robert Bornholdt has not sought review.

ARGUMENT

POINT I

The New York statutory definition of felony murder does not shift the burden of proof to the defendant as to material elements of the crime.

In New York a killing "in the course of, and in furtherance of" certain specified crimes, or in the course "of immediate flight therefrom," is a felony murder. There is, however, an "affirmative defense" that can be established by the defendant by the preponderance of the evidence [N.Y. Penal Law §25.00(2)]. That defense is:

> "(I)n any prosecution under this subdivision [the felony murder subdivision], in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:
>
> (a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
>
> (b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and
>
> (c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

> (d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury." N.Y. Penal Law §125.25.

Petitioner seeks review of his conviction for felony murder by urging that the affirmative defense violates due process by changing the burden of proof on essential elements of the crime and violates his right against self-incrimination. The issue does not warrant review here. The state's statutory structure, taken as a whole, requires that all the elements of the crime must be proven by the People, beyond a reasonable doubt, but, if the defendant can prove that certain facts in mitigation exist, he is not to be convicted.

Under New York's long accepted common law doctrine of felony murder, a "heavy responsibility" is placed upon all who act together in the commission of a felony. *People* v. *Giro,* 197 N.Y. 152, 158 (1910).

> "Where a number of persons are acting together in the commission of the felony, a homicide perpetrated in furtherance of the felony is deemed to be within the common purpose and all are alike responsible in law therefor." *People* v. *Giusto,* 206 N.Y. 67, 73-74 (1912); *People* v. *Sobiskoda,* 235 N.Y. 411, 417 (1923); *People* v. *Usefof,* 227 N.Y. 622 (1919); *People* v. *Michalow,* 229 N.Y. 325 (1920); *People* v. *Corbo,* 284 App. Div. 273 (1st Dept. 1954), *aff'd,* 307 N.Y. 928 (1954); *People* v. *Wood,* 8 N.Y.2d 48 (1960).

Under this principle, a lookout has been held accountable for a homicide committed in furtherance of the felony [*People* v. *Usefof, supra*], as has been a robber who remained downstairs in a building while an accomplice committed a homicide upstairs. *People* v. *Giusto, supra.* A

co-conspirator who planned the felony was just as responsible as the actual killer for a killing that furthered the felony, even though he was not present during its commission. *People* v. *Michalow, supra*; *People* v. *Ryan,* 263 N.Y. 298 (1934). Indeed, if the homicidal act is in furtherance of the felony, the accomplice may be held responsible even though there was an express agreement not to kill, and even if he actually attempted to prevent the killing. *People* v. *Friedman,* 205 N.Y. 161 (1912); *People* v. *Wood, supra.*

By the same token, where a felon kills, not in furtherance of the felony, but in a "separate and distinct act and to satisfy his own end" [*People* v. *Wood, supra* at 52], or for a "personal reason" unrelated to the felony [*People* v. *Elling,* 289 N.Y. 419 (1943)], his accomplice is not accountable for the killing. Thus, contrary to petitioner's assertion (petition, p. 8), there has not been a New York requirement that "The People must prove the non-shooting defendant acted in concert with the shooting defendant in a felony murder prosecution." The New York test is whether the killing was related to the purpose of the underlying felony—in this case, escape.

As the New York Court of Appeals held in this case: "The harshness of the rule in particular cases was apparent, and hence, the instant provisions were incorporated in the revised Penal Law affording an accomplice of a felon who kills an opportunity to 'fight his way out' of a felony murder charge." (opinion, petition, App. at A-6.) Thus, the defense at issue here provides that certain facts, "none * * * [of which] constituted a defense to the crime of felony murder where the defendant had the requisite fe-

lonious involvement" (*ibid.*), could, if proven by the defense, exonerate him. Concluding that the felony murder rule "may be unduly harsh in particular instances," the Legislature enacted the affirmative defense "to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder." Denzer and McQuillan, *Practice Commentary to Penal Law* §125.25 (McKinney, ed.). The legislative decision is a rational one.

In *Morrison* v. *California,* 291 U.S. 82, 88-9 (1934), this Court, in upholding the validity of the burden placed on a defendant to prove his citizenship as a defense in a prosecution under the California Alien Land Law, held:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunity for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

The defense at issue here falls within *Morrison.* The statutory defense applies only to a non-shooting defendant who can establish lack of complicity in the killing and lack of knowledge of the existence of the weapon and of its possible use. Thus, like the burden of proof of the defense of insanity, which despite petitioner's citation to *Davis* v. *United States,* 160 U.S. 469 (1895) (petition, p. 9), this Court has held, may be placed on a defendant [*Leland* v. *Oregon,* 343 U.S. 790, 800 (1952)], the burden of proof

of the defense of lack of knowledge here may be placed upon one who would be guilty of murder in the absence of that defense. Indeed, there is no question that constitutionally the New York Legislature could have retained the strict felony murder rule without at all providing for the defense.

Moreover, under this statute, no defendant is forced to take the stand to raise this defense; Victory, in particular, did not have to do so and, in fact, chose not to. As Victory's trial counsel observed, "the affirmative defenses can be elicited either from the prosecution's witnesses or from direct or cross-examination of any witnesses * * *. It is not limited to testimony of a defendant" (2676, 3137). And, to be sure, Victory's trial counsel in fact argued the affirmative defense strenuously and extensively in his summation without calling the defendant as a witness. *See People* v. *Moro,* 23 N.Y.2d 496 (1969).

POINT II

There was an adequate state ground for denying the motion for a severance; in any event, the state courts applied the proper federal standards.

Petitioner alleges that he was denied due process because the trial court refused to sever his case from his co-defendant's. The state courts have held that the motion was untimely, thereby applying an adequate state law basis for the denial of the motion.

The two defendants were jointly indicted in October 1968 for the felony murder of Patrolman Varecha. By

motion returnable September 4, 1969, the People moved to consolidate the felony murder indictment with the separate intentional murder indictment against Bornholdt (55A-60A). In an untimely affirmation (see 8A) dated January 21, 1970, Victory opposed consolidation and requested a severance of his case from Bornholdt's. He alleged that Bornholdt's insanity defense which implicitly admitted his own guilt, "would make it impossible for the jury in a joint trial to render a fair and impartial verdict on behalf of the defendant Victory" (62A); that Bornholdt's incompetence to stand trial prejudiced Victory's defense; and that the questions raised by the intentional murder count could not be separated in the jury's mind from the issues on the felony murder count (*ibid.*). The motion to consolidate was granted February 10, 1970 (see 8A).

In a motion returnable March 2, 1970, the date when the case was moved for trial and the selection of the jury commenced, Albert Victory again requested a severance of his case from that of his co-defendant Robert Bornholdt, this time on the ground that he intended to call his co-defendant as a witness for the defense in order to introduce through him a statement which Bornholdt had allegedly made and which purportedly "exculpated" Victory (126A-129A).

In an affidavit in support of this motion, Michael C. Pollina, Esq., counsel for Victory, averred that he had been advised by Bornholdt's attorney that if Bornholdt were called as a witness, he would assert his privilege against self-incrimination; that Victory "needed" Bornholdt's testimony, and without it could not "properly present a defense"; and that under *People* v. *Owens,* 22 N.Y.2d 93

(1968), he would be barred in a joint trial from calling Bornholdt as his witness, or commenting on his failure to testify, and that the only way he could properly do so would be in a separate trial.*

Bornholdt's unsigned "statement" was not then shown to have actually been made by Bornholdt; Victory's counsel, Michael Pollina, Esq., later stated that the original signed statement was in the possession of an attorney for Bornholdt who had dictated the contents to Mr. Pollina's secretary (VD 165-6, 25-7).** In any event, the "statement" was attached to Victory's moving papers (Victory's Exh. A; 130A):

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur. I alone did the shooting because the police officer had clubed [*sic*] me on the head and had pointed and fired his gun at me and Albert. Both Albert and I would have been killed by this police officer who had gone crazy and had clubed me and Albert and he was going to shoot us."

Counsel for Victory argued this motion on March 3, 1970, after both sides had started to select the jury. Mr. Pollina indicated that he had obtained Bornholdt's state-

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* Later, Victory again moved for a severance, this time on a different theory, alleging that his co-defendant would be unable to participate in the defense due to having been administered certain drugs for his psychiatric condition (137A-139A). This motion was also denied (136A).

** The argument on the motion was transcribed at pages 22-57 of volume 4 of the printed record. When the minutes of the *voir dire* of the jury were transcribed pursuant to the Appellate Division's order (4A), the argument was retranscribed. References preceded by VD are to pages of the *voir dire* minutes, which appear in volumes 1-4 of the printed record. For the Court's convenience the references to this argument will be to both sets of minutes.

ment through an attorney, "Mr. Kramer," who had previously represented Bornholdt, and who, at Mr. Pollina's request, had dictated the statement to Mr. Pollina's secretary (VD 165-7; 25-7).

Pollina indicated that he had known about the statement for "several months" (VD 182; 43). But he claimed that he had not requested a severance earlier because, he alleged, due to Bornhold's psychiatric condition it was not known until March 2 whether Bornholdt would in fact go to trial or be declared incompetent. [Bornholdt had actually been committed for psychiatric examination on January 27, 1970 (see 8A), one week after Victory had made his first severance request.] Further Pollina stated, "I have no obligation to indicate to the People the manner in which I intend to submit my defense" and, "in effect, assist the prosecution in preparing their case" (VD 182; 43-4).

Neither in his motion papers nor on oral argument did Pollina make any showing whatsoever as to what Bornholdt's testimony would be, that it would have any exculpatory effect on Victory, or that Bornholdt would in fact testify were he called as a witness in a separate trial.

In response to the court's inquiry, Bornholdt's attorney, Seymour Brown, Esq., stated that if his client were called to the stand by Victory, "he will decline to testify, based upon the Fifth Amendment" (VD 174-5; 35). Nevertheless, Pollina argued, he had the "right to call Mr. Bornholdt as a witness despite the fact that he has been instructed by his attorney to assert his privilege, and that the defendant Victory has an absolute right to comment on that failure to the jury" (VD 175; 35-6).

In its decision of March 3, the court denied the motion for a severance (124A-125A). The court ruled that despite "the information relating to the statement Bornholdt allegedly gave to an attorney (being) in possession of Victory's attorney for many months * * * he failed to make a timely motion for a severance of Victory's trial until the eve of trial. The unexplained long delay in moving for a severance would, under *People* v. *Owens*, 22 N.Y. 2d 93 (1968) justify the court in denying the motion for a severance on that ground alone." The court found that the alleged statement of Bornholdt which purportedly exonerated Victory was "purely a conclusory statement which Bornholdt would be prohibited from making even if he were called and testified." And since, the court observed, the law prohibits the calling of a witness who the attorney knows, in advance, will claim his privilege, solely for the purpose of permitting the attorney to comment on the failure of the witness to give testimony, the court "admonished" counsel for Victory "that under no circumstances shall he attempt to call Bornholdt as a witness on his case."

Three weeks later, Victory unsuccessfully renewed his motion for a severance (141A-145A), reiterating substantially the same arguments he made previously, noting that "the decision not to move for a severance [earlier] was a strategic one." Again during the trial Victory repeated his request for a severance (1952), and his request to call Bornholdt as his witness or to comment on his failure to testify (1955, 2547), and also requested the right to call the attorney Kramer as his witness in order to introduce Bornholdt's statement into evidence (2540-4). The court denied these requests.

Under the established New York rule a motion for a severance must be timely. As then Judge BREITEL stated for the court in *People* v. *Owens, supra* at 98:

> "[I]f a defendant knows or should have known in advance of trial of his intention to call a codefendant as a witness or that of a codefendant to call him as a witness the application for appropriate relief must be made in advance of trial, indeed, as early as it is reasonably feasible."

Thus, at the outset it is clear that the trial court correctly exercised its discretion to find that the application was untimely. Victory's motion was not, as he now states, made "three weeks before trial" (petition, p. 15, n. 12), but was returnable the day that the *voir dire* began. Victory tries vainly to offer an explanation for his waiting "several months" to make the motion (petition, p. 15, n. 12). It is insufficient. Victory's claim that he never knew whether Bornholdt would actually go to trial or be found incompetent is self-serving, irrelevant and speculative. It is also misleading. Bornholdt had just been ordered to undergo a new psychiatric examination on January 27, 1970 (8A), only one week after Victory had first requested a severance on grounds unrelated to Bornholdt's testimony (61A-63A). He should have brought his motion when he first learned of the information months earlier. *People* v. *Owens, supra* at 98. Victory's stated reasons for not making his motion earlier is more revealing: he did not wish to divulge his case to the prosecution. On that score alone, the trial court had an ample basis for the exercise of its discretion and correctly denied the motion. So too did the Court of Appeals, which held: "finally, the motion was untimely in that it was not made until the eve of trial al-

though the facts on which it was based were known to defense counsel months earlier" (opinion, petition, App. at A-11). The Constitution surely does not preclude reliance on a reasonable rule requiring that a severance motion be timely.

As the opinion below indicates, the New York courts gave proper weight to the prevealing principles on the merits of the application and found that the application was factually deficient (see opinion, petition, App. at A-10; A-11).

Several relevant factual matters also deserve mention. Bornholdt's statement standing alone—if in fact he ever made it—is at least a neutral document as far as Victory is concerned, and, much more likely, a damning indictment of both him and his accomplice. It has absolutely no exculpatory effect on Victory's role in the felony murder. For, the prosecution's theory at trial was that Victory and Bornholdt escaped, during which Bornholdt killed the officer. As far as Victory mattered, all the prosecution needed to prove was that Victory escaped and that in furtherance of the escape Bornholdt shot and killed the officer. The prosecution was not required to prove, albeit it did offer proof in this regard, that Victory had any role at all in the shooting.

Thus, rather than exonerating Victory, Bornholdt's statement served to corroborate some of the salient facts proved by the prosecution regarding the felony murder. For example, it supported the People's testimony that there was a violent confrontation with the police officer, that the officer was impelled at one point to use his nightstick upon the defendants, and compelled to draw his gun. It is

reasonable to infer from such a statement, in line with the prosecution's theory, that certain conduct by the defendants, that is, an attempt to escape, served as a predicate for the officer's desperate acts.

And, despite Victory's suggestion (petition, p. 16, n. 14), the statement allegedly made by Bornholdt would not be admissible as a declaration against his penal interest at a separate trial of Victory alone. *Cf. People* v. *Brown*, 26 NY2d 88 (1970). First, under the circumstances presented in the record it was not clearly established that the statement was, in fact, made by Bornholdt. Secondly, the statement, in its entirety, is not against Bornholdt's penal interest, since in it he asserted that he shot the police officer but maintained that it was in self-defense. A statement which contains within its four corners a defense—"both Albert and I would have been killed by this police officer who had gone crazy and had clubed [*sic*] me and Albert and he was going to shoot us" (130A)—is not against the maker's interest and thus is not admissible under the exceptions to the hearsay rule.

Petitioner relies upon *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), for the proposition that any state evidentiary rule that excludes exculpatory evidence automatically violates due process (see petition, p. 16). However, it appears that the Court was merely placing a due process proscription on the use of over-technical state rules. "The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the States." *Id.* at 297-8. The Court also rejected the argument that using

the guise of the hearsay rule to limit the right to introduce exculpatory evidence may violate due process. However, the Court surely did not prevent the use of reasonable, rational rules to determine the propriety of a joint trial. Victory offered nothing of probative value to require a severance and, therefore, the state courts' sound exercise of discretion is not invalidated by *Chambers*.

POINT III

The rights of confrontation and due process are not violated by a rule which defines the type of prior inconsistencies which may be used to impeach a witness at trial.

During the cross-examination of one of the People's main witnesses at trial, the defendant tried to impeach him by using an allegedly inconsistent prior statement. The alleged inconsistency was that in two of the three statements which the witness gave to the police and prosecutors on the night of the crime, his description of the events did not include a statement that Victory had kneed Patrolman Varecha in the groin. In the third statement, the kneeing was mentioned. Petitioner urges this Court to review the Court of Appeals' ruling because, he alleges, it denied him the right of confrontation.

There is, however, no federal constitutional question raised by a state's reasonable evidentiary ruling that before a witness may be impeached by an omission in a prior statement, the cross-examiner must show that on the prior occasion the "witness's attention was called to the matter and that he was specifically asked about the facts embraced

in the question propounded at trial'' (opinion, petition, App. at A-12).

Mere questions of the scope of state evidentiary rules do not rise to the level of constitutional claims. A constitutional claim would appear to exist where an archaic, irrational rule that ''bears little present relationship to the realities of the criminal process'' is applied to effectively preclude a defendant from adducing the truth at trial. *Chambers* v. *Mississippi*, 410 U.S. 284, 296 (1973). That is not the case here.

The holding below is no more than an evidentiary rule, reasonably regulating the scope of cross-examination of an adversary's witness. The Court of Appeals concluded that its rule was a reasonable one since it ''accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description'' (opinion, petition, App. at A-12). And, as the court below noted, nearly every state court which has considered the question has concluded that a rule similar to the New York rule is proper.

POINT IV

The trial jury was properly selected.

Petitioner also argues that review is warranted since there was a ''death qualified'' trial jury.

For over three weeks several hundred prospective panelists were examined by the court, the prosecution and the defense with a view to selecting a fair-minded jury

capable of rendering impartial judgments on the issue of guilt and, since this was a capital case (N.Y. Penal Law §125.30), punishment. Such a jury was selected, as evidenced by its care and deliberateness in reaching its verdict, and by its mercy in recommending life imprisonment.

Victory attacks the selection process, claiming that it resulted in a "death-qualified jury," and intimating that such a jury was "prosecution-oriented" and "ready to convict the defendant" (petition, pp. 17-18). He cites *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968) and its progeny to support his claim.

Petitioner is precluded from raising the issue, since the jury recommended life imprisonment, not death. *Bumper* v. *North Carolina,* 391 U.S. 543, 545 (1968).

And, since Victory raises the point (petition, pp. 17-18), it should be noted that both *Witherspoon* and *Bumper* considered and unequivocally rejected the proposition that a jury composed only of jurors entertaining no scruples against voting the death penalty—hardly the case here—was prosecution-oriented and ready to convict the defendant. *Witherspoon* v. *Illinois, supra* at 516-518; *Bumper* v. *North Carolina, supra* at 545.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1974